

2011-2012 Regular Sessions

I N S E N A T E

(PREFILED)

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Introduced by Sens. SQUADRON, BRESLIN, PARKER, SERRANO -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary

AN ACT to amend the general construction law and the business corporation law, in relation to authorizing the incorporation of benefit corporations, providing for the public benefit to be created by benefit corporations, for the election and termination of the status of a benefit corporation, for the standards of conduct for directors of a benefit corporation, and for the preparation and distribution of an annual benefit report by a benefit corporation

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. Paragraphs 3 and 4 of subdivision d of section 65 of the
2 general construction law, as added by chapter 451 of the laws of 1973
3 are amended and a new paragraph 5 is added to read as follows:
4 3. A railroad corporation, [or]
5 4. A transportation corporation[.], OR
6 5. A BENEFIT CORPORATION.
7 S 2. Section 66 of the general construction law is amended by adding a
8 new subdivision 4-a to read as follows:
9 4-A. A "BENEFIT CORPORATION" MEANS A BUSINESS CORPORATION THAT HAS
10 ELECTED TO BECOME SUBJECT TO ARTICLE SEVENTEEN OF THE BUSINESS CORPO-
11 RATION LAW AND WHOSE STATUS AS A BENEFIT CORPORATION HAS NOT BEEN TERMI-
12 NATED AS PROVIDED IN ARTICLE SEVENTEEN OF THE BUSINESS CORPORATION LAW.
13 S 3. The business corporation law is amended by adding a new article
14 17 to read as follows:
15 ARTICLE 17
16 BENEFIT CORPORATIONS
17 SECTION 1701. APPLICATION AND EFFECT OF ARTICLE.
18 1702. DEFINITIONS.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [] is old law to be omitted.

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1703. FORMATION OF BENEFIT CORPORATIONS.

1704. ELECTION OF AN EXISTING BUSINESS CORPORATION TO BECOME A BENEFIT CORPORATION.

1705. TERMINATION OF BENEFIT CORPORATION STATUS.

1706. CORPORATE PURPOSES.

1707. STANDARD OF CONDUCT FOR DIRECTORS.

1708. ANNUAL BENEFIT REPORT.

S 1701. APPLICATION AND EFFECT OF ARTICLE.

(A) THIS ARTICLE SHALL BE APPLICABLE TO ALL BENEFIT CORPORATIONS.

(B) THE EXISTENCE OF A PROVISION OF THIS ARTICLE SHALL NOT OF ITSELF CREATE ANY IMPLICATION THAT A CONTRARY OR DIFFERENT RULE OF LAW IS OR WOULD BE APPLICABLE TO A BUSINESS CORPORATION THAT IS NOT A BENEFIT CORPORATION. THIS ARTICLE SHALL NOT AFFECT ANY STATUTE OR RULE OF LAW THAT IS OR WOULD BE APPLICABLE TO A BUSINESS CORPORATION THAT IS NOT A BENEFIT CORPORATION.

(C) EXCEPT AS OTHERWISE PROVIDED IN THIS ARTICLE, THIS CHAPTER SHALL BE GENERALLY APPLICABLE TO ALL BENEFIT CORPORATIONS.

(D) A PROVISION OF THE CERTIFICATE OF INCORPORATION OR BYLAWS OF A BENEFIT CORPORATION MAY NOT RELAX, BE INCONSISTENT WITH OR SUPERSEDE ANY PROVISION OF THIS ARTICLE.

S 1702. DEFINITIONS.

AS USED IN THIS ARTICLE, UNLESS THE CONTEXT OTHERWISE REQUIRES, THE TERM:

(A) "BENEFIT CORPORATION" MEANS A BUSINESS CORPORATION THAT HAS ELECTED TO BECOME SUBJECT TO THIS ARTICLE AND WHOSE STATUS AS A BENEFIT CORPORATION HAS NOT BEEN TERMINATED AS PROVIDED IN THIS ARTICLE.

(B) "GENERAL PUBLIC BENEFIT" MEANS A MATERIAL POSITIVE IMPACT ON SOCIETY AND THE ENVIRONMENT, AS MEASURED BY A THIRD-PARTY STANDARD.

(C) "INDEPENDENT" MEANS THAT A PERSON HAS NO MATERIAL RELATIONSHIP WITH A BENEFIT CORPORATION OR ANY OF ITS SUBSIDIARIES (OTHER THAN THE RELATIONSHIP OF SERVING AS THE BENEFIT DIRECTOR OR BENEFIT OFFICER), EITHER DIRECTLY OR AS A SHAREHOLDER, PARTNER, MEMBER OR OTHER OWNER OR A DIRECTOR, OFFICER OR OTHER MANAGER OF AN ENTITY THAT HAS A MATERIAL RELATIONSHIP WITH THE BENEFIT CORPORATION OR ANY OF ITS SUBSIDIARIES. A MATERIAL RELATIONSHIP BETWEEN AN INDIVIDUAL AND A BENEFIT CORPORATION OR ANY OF ITS SUBSIDIARIES WILL BE CONCLUSIVELY PRESUMED TO EXIST IF:

(1) THE PERSON IS, OR HAS BEEN WITHIN THE LAST THREE YEARS, AN EMPLOYEE OF THE BENEFIT CORPORATION OR ANY OF ITS SUBSIDIARIES;

(2) AN IMMEDIATE FAMILY MEMBER OF THE PERSON IS, OR HAS BEEN WITHIN THE LAST THREE YEARS, AN EXECUTIVE OFFICER OF THE BENEFIT CORPORATION OR ANY OF ITS SUBSIDIARIES; OR

(3) THE PERSON, OR AN ENTITY OF WHICH THE PERSON IS A DIRECTOR, OFFICER OR OTHER MANAGER OR IN WHICH THE PERSON OWNS BENEFICIALLY OR OF RECORD FIVE PERCENT OR MORE OF THE EQUITY INTERESTS, OWNS BENEFICIALLY OR OF RECORD FIVE PERCENT OR MORE OF THE SHARES OF THE BENEFIT CORPORATION.

(D) "MINIMUM STATUS VOTE" MEANS THAT, IN ADDITION TO ANY OTHER APPROVAL OR VOTE REQUIRED BY THIS CHAPTER, THE CERTIFICATE OF INCORPORATION OR A BYLAW ADOPTED BY THE SHAREHOLDERS:

(1) THE HOLDERS OF SHARES OF EVERY CLASS OR SERIES SHALL BE ENTITLED TO VOTE ON THE CORPORATE ACTION REGARDLESS OF ANY LIMITATION STATED IN THE CERTIFICATE OF INCORPORATION OR BYLAWS ON THE VOTING RIGHTS OF ANY CLASS OR SERIES.

(2) THE CORPORATE ACTION MUST BE APPROVED BY VOTE OF THE SHAREHOLDERS OF EACH CLASS OR SERIES ENTITLED TO CAST AT LEAST THREE-QUARTERS OF THE

VOTES THAT ALL SHAREHOLDERS OF THE CLASS OR SERIES ARE ENTITLED TO CAST THEREON.

(E) "SPECIFIC PUBLIC BENEFIT," AS MEASURED BY A THIRD-PARTY STANDARD, INCLUDES:

(1) PROVIDING LOW-INCOME OR UNDERSERVED INDIVIDUALS OR COMMUNITIES WITH BENEFICIAL PRODUCTS OR SERVICES;

(2) PROMOTING ECONOMIC OPPORTUNITY FOR INDIVIDUALS OR COMMUNITIES BEYOND THE CREATION OF JOBS IN THE NORMAL COURSE OF BUSINESS;

(3) PRESERVING THE ENVIRONMENT;

(4) IMPROVING HUMAN HEALTH;

(5) PROMOTING THE ARTS, SCIENCES OR ADVANCEMENT OF KNOWLEDGE;

(6) INCREASING THE FLOW OF CAPITAL TO ENTITIES WITH A PUBLIC BENEFIT PURPOSE; AND

(7) THE ACCOMPLISHMENT OF ANY OTHER PARTICULAR BENEFIT FOR SOCIETY OR THE ENVIRONMENT.

(F) "SUBSIDIARY" MEANS AN ENTITY IN WHICH A PERSON OWNS BENEFICIALLY OR OF RECORD FIFTY PERCENT OR MORE OF THE EQUITY INTERESTS.

(G) "THIRD-PARTY STANDARD" MEANS A STANDARD RECOGNIZED BY THE SECRETARY OF STATE OR ITS DESIGNEE OR DESIGNEES FOR DEFINING, REPORTING AND ASSESSING CORPORATE SOCIAL AND ENVIRONMENTAL PERFORMANCE THAT IS:

(1) DEVELOPED BY A PERSON THAT IS INDEPENDENT OF THE BENEFIT CORPORATION; AND

(2) TRANSPARENT BECAUSE THE FOLLOWING INFORMATION ABOUT THE STANDARD IS PUBLICLY AVAILABLE:

(A) THE FACTORS CONSIDERED WHEN MEASURING THE PERFORMANCE OF A BUSINESS;

(B) THE RELATIVE WEIGHTINGS OF THOSE FACTORS; AND

(C) THE IDENTITY OF THE PERSONS WHO DEVELOPED AND CONTROL CHANGES TO THE STANDARD AND THE PROCESS BY WHICH THOSE CHANGES ARE MADE.

S 1703. FORMATION OF BENEFIT CORPORATIONS.

A BENEFIT CORPORATION SHALL BE FORMED IN ACCORDANCE WITH THIS CHAPTER EXCEPT THAT ITS CERTIFICATE OF INCORPORATION SHALL ALSO STATE THAT IT IS A BENEFIT CORPORATION.

S 1704. ELECTION OF AN EXISTING BUSINESS CORPORATION TO BECOME A BENEFIT CORPORATION.

(A) A BUSINESS CORPORATION MAY BECOME A BENEFIT CORPORATION UNDER THIS ARTICLE BY AMENDING ITS CERTIFICATE OF INCORPORATION SO THAT IT CONTAINS A STATEMENT THAT THE CORPORATION IS A BENEFIT CORPORATION. THE AMENDMENT SHALL NOT BE EFFECTIVE UNLESS IT IS ADOPTED BY AT LEAST THE MINIMUM STATUS VOTE.

(B) ANY CORPORATION THAT IS NOT A BENEFIT CORPORATION THAT IS A PARTY TO A MERGER OR CONSOLIDATION IN WHICH THE SURVIVING OR CONSOLIDATED CORPORATION WILL BE A BENEFIT CORPORATION MUST APPROVE THE PLAN OF MERGER OR CONSOLIDATION BY AT LEAST THE MINIMUM STATUS VOTE IN ADDITION TO ANY OTHER VOTE REQUIRED BY THIS CHAPTER, THE CERTIFICATE OF INCORPORATION OR THE BYLAWS.

S 1705. TERMINATION OF BENEFIT CORPORATION STATUS.

(A) A BENEFIT CORPORATION MAY TERMINATE ITS STATUS AS SUCH AND CEASE TO BE SUBJECT TO THIS ARTICLE BY AMENDING ITS CERTIFICATE OF INCORPORATION TO DELETE THE STATEMENT THAT THE CORPORATION IS A BENEFIT CORPORATION. THE AMENDMENT SHALL NOT BE EFFECTIVE UNLESS IT IS ADOPTED BY AT LEAST THE MINIMUM STATUS VOTE.

(B) IF A PLAN OR MERGER OR CONSOLIDATION WOULD HAVE THE EFFECT OF TERMINATING THE STATUS OF A BUSINESS CORPORATION AS A BENEFIT CORPORATION, THE PLAN SHALL NOT BE EFFECTIVE UNLESS IT IS ADOPTED BY AT LEAST THE MINIMUM STATUS VOTE.

1 S 1706. CORPORATE PURPOSES.

2 (A) EVERY BENEFIT CORPORATION SHALL HAVE A PURPOSE OF CREATING GENERAL
3 PUBLIC BENEFIT. THIS PURPOSE IS IN ADDITION TO ITS PURPOSES UNDER
4 SECTION TWO HUNDRED ONE OF THIS CHAPTER AND ANY SPECIFIC PURPOSE SET
5 FORTH IN ITS ARTICLES UNDER PARAGRAPH (B) OF THIS SECTION. THE PURPOSE
6 TO CREATE GENERAL PUBLIC BENEFIT MAY BE A LIMITATION ON THE OTHER
7 PURPOSES OF THE BENEFIT CORPORATION, AND SHALL CONTROL OVER ANY INCON-
8 SISTENT PURPOSE OF THE BENEFIT CORPORATION.

9 (B) THE ARTICLES OF A BENEFIT CORPORATION MAY IDENTIFY ONE OR MORE
10 SPECIFIC PUBLIC BENEFITS THAT IT IS THE PURPOSE OF THE BENEFIT CORPO-
11 RATION TO CREATE IN ADDITION TO ITS PURPOSES UNDER SECTION TWO HUNDRED
12 ONE OF THIS CHAPTER AND PARAGRAPH (A) OF THIS SECTION.

13 (C) THE CREATION OF GENERAL AND SPECIFIC PUBLIC BENEFITS AS PROVIDED
14 IN PARAGRAPHS (A) AND (B) OF THIS SECTION IS IN THE BEST INTERESTS OF
15 THE BENEFIT CORPORATION.

16 (D) A BENEFIT CORPORATION MAY AMEND ITS CERTIFICATE OF INCORPORATION
17 TO ADD, AMEND OR DELETE THE IDENTIFICATION OF A SPECIFIC PUBLIC BENEFIT
18 THAT IT IS THE PURPOSE OF THE BENEFIT CORPORATION TO CREATE. THE AMEND-
19 MENT SHALL NOT BE EFFECTIVE UNLESS IT IS ADOPTED BY AT LEAST THE MINIMUM
20 STATUS VOTE.

21 S 1707. STANDARD OF CONDUCT FOR DIRECTORS.

22 (A) IN DISCHARGING THE DUTIES OF THEIR RESPECTIVE POSITIONS, THE BOARD
23 OF DIRECTORS, COMMITTEES OF THE BOARD AND INDIVIDUAL DIRECTORS OF A
24 BENEFIT CORPORATION:

25 (1) SHALL CONSIDER THE EFFECTS OF ANY ACTION UPON:

26 (A) THE ABILITY FOR THE BENEFIT CORPORATION TO ACCOMPLISH ITS PUBLIC
27 BENEFIT PURPOSE;

28 (B) THE SHAREHOLDERS OF THE BENEFIT CORPORATION;

29 (C) THE EMPLOYEES AND WORKFORCE OF THE BENEFIT CORPORATION AND ITS
30 SUBSIDIARIES AND SUPPLIERS;

31 (D) THE INTERESTS OF CUSTOMERS AS BENEFICIARIES OF THE GENERAL OR
32 SPECIFIC PUBLIC BENEFIT PURPOSES OF THE BENEFIT CORPORATION;

33 (E) COMMUNITY AND SOCIETAL CONSIDERATIONS, INCLUDING THOSE OF ANY
34 COMMUNITY IN WHICH OFFICES OR FACILITIES OF THE BENEFIT CORPORATION OR
35 ITS SUBSIDIARIES OR SUPPLIERS ARE LOCATED;

36 (F) THE LOCAL AND GLOBAL ENVIRONMENT; AND

37 (G) THE SHORT-TERM AND LONG-TERM INTERESTS OF THE BENEFIT CORPORATION,
38 INCLUDING BENEFITS THAT MAY ACCRUE TO THE BENEFIT CORPORATION FROM ITS
39 LONG-TERM PLANS AND THE POSSIBILITY THAT THESE INTERESTS MAY BE BEST
40 SERVED BY THE CONTINUED INDEPENDENCE OF THE BENEFIT CORPORATION;

41 (2) MAY CONSIDER:

42 (A) THE RESOURCES, INTENT AND CONDUCT (PAST, STATED AND POTENTIAL) OF
43 ANY PERSON SEEKING TO ACQUIRE CONTROL OF THE CORPORATION; AND

44 (B) ANY OTHER PERTINENT FACTORS OR THE INTERESTS OF ANY OTHER GROUP
45 THAT THEY DEEM APPROPRIATE; AND

46 (3) SHALL NOT BE REQUIRED TO GIVE PRIORITY TO THE INTERESTS OF ANY
47 PARTICULAR PERSON OR GROUP REFERRED TO IN SUBPARAGRAPHS ONE AND TWO OF
48 THIS PARAGRAPH OVER THE INTERESTS OF ANY OTHER PERSON OR GROUP UNLESS
49 THE BENEFIT CORPORATION HAS STATED ITS INTENTION TO GIVE PRIORITY TO
50 INTERESTS RELATED TO A SPECIFIC PUBLIC BENEFIT PURPOSE IDENTIFIED IN ITS
51 CERTIFICATE OF INCORPORATION.

52 (B) THE CONSIDERATION OF INTERESTS AND FACTORS IN THE MANNER REQUIRED
53 BY PARAGRAPH (A) OF THIS SECTION:

54 (1) SHALL NOT CONSTITUTE A VIOLATION OF THE PROVISIONS OF SECTION
55 SEVEN HUNDRED SEVENTEEN OF THIS CHAPTER; AND

(2) IS IN ADDITION TO THE ABILITY OF DIRECTORS TO CONSIDER INTERESTS AND FACTORS AS PROVIDED IN SECTION SEVEN HUNDRED SEVENTEEN OF THIS CHAPTER.

(C) NOTWITHSTANDING THE PROVISIONS OF PARAGRAPH (B) OF THIS SECTION, A DIRECTOR OF A BENEFIT CORPORATION HAS THE FIDUCIARY DUTIES OF A DIRECTOR OF A BUSINESS CORPORATION THAT IS NOT A BENEFIT CORPORATION EXCEPT TO THE EXTENT THOSE DUTIES ARE INCONSISTENT WITH THE PROVISIONS OF THIS ARTICLE.

S 1708. ANNUAL BENEFIT REPORT.

(A) A BENEFIT CORPORATION MUST DELIVER TO EACH SHAREHOLDER AN ANNUAL BENEFIT REPORT INCLUDING:

(1) A NARRATIVE DESCRIPTION OF:

(A) THE WAYS IN WHICH THE BENEFIT CORPORATION PURSUED GENERAL PUBLIC BENEFIT DURING THE YEAR AND THE EXTENT TO WHICH GENERAL PUBLIC BENEFIT WAS CREATED;

(B) THE WAYS IN WHICH THE BENEFIT CORPORATION PURSUED ANY SPECIFIC PUBLIC BENEFIT THAT THE CERTIFICATE OF INCORPORATION STATES IT IS THE PURPOSE OF THE BENEFIT CORPORATION TO CREATE AND THE EXTENT TO WHICH THAT SPECIFIC PUBLIC BENEFIT WAS CREATED; AND

(C) ANY CIRCUMSTANCES THAT HAVE HINDERED THE CREATION BY THE BENEFIT CORPORATION OF GENERAL OR SPECIFIC PUBLIC BENEFIT;

(2) AN ASSESSMENT OF THE PERFORMANCE OF THE BENEFIT CORPORATION, RELATIVE TO ITS GENERAL PUBLIC BENEFIT PURPOSE AND, IF APPLICABLE, ITS SPECIFIC PUBLIC BENEFIT PURPOSE OR PURPOSES, PREPARED IN ACCORDANCE WITH A THIRD-PARTY STANDARD APPLIED CONSISTENTLY WITH ANY APPLICATION OF THAT STANDARD IN PRIOR BENEFIT REPORTS OR ACCOMPANIED BY AN EXPLANATION OF THE REASONS FOR ANY INCONSISTENT APPLICATION;

(3) THE COMPENSATION PAID BY THE BENEFIT CORPORATION DURING THE YEAR TO EACH DIRECTOR IN THAT CAPACITY; AND

(4) THE NAME OF EACH PERSON THAT OWNS BENEFICIALLY OR OF RECORD FIVE PERCENT OR MORE OF THE OUTSTANDING SHARES OF THE BENEFIT CORPORATION.

(B) THE BENEFIT REPORT MUST BE SENT ANNUALLY TO EACH SHAREHOLDER WITHIN ONE HUNDRED TWENTY DAYS FOLLOWING THE END OF THE FISCAL YEAR OF THE BENEFIT CORPORATION OR AT THE SAME TIME THAT THE BENEFIT CORPORATION DELIVERS ANY OTHER ANNUAL REPORT TO ITS SHAREHOLDERS. DELIVERY OF A BENEFIT REPORT TO SHAREHOLDERS IS IN ADDITION TO ANY OTHER REQUIREMENT TO DELIVER AN ANNUAL REPORT TO SHAREHOLDERS.

(C) A BENEFIT CORPORATION MUST POST ITS MOST RECENT BENEFIT REPORT ON THE PUBLIC PORTION OF ITS WEBSITE, IF ANY, EXCEPT THAT THE COMPENSATION PAID TO DIRECTORS AND ANY FINANCIAL OR PROPRIETARY INFORMATION INCLUDED IN THE BENEFIT REPORT MAY BE OMITTED FROM THE BENEFIT REPORT AS POSTED.

(D) CONCURRENTLY WITH THE DELIVERY OF THE BENEFIT REPORT TO SHAREHOLDERS PURSUANT TO PARAGRAPH (B) OF THIS SECTION, THE BENEFIT CORPORATION MUST DELIVER A COPY OF THE BENEFIT REPORT TO THE DEPARTMENT FOR FILING, EXCEPT THAT THE COMPENSATION PAID TO DIRECTORS AND ANY FINANCIAL OR PROPRIETARY INFORMATION INCLUDED IN THE BENEFIT REPORT MAY BE OMITTED FROM THE BENEFIT REPORT AS FILED UNDER THIS SECTION.

(E) IF A BENEFIT CORPORATION HAS NOT DELIVERED A BENEFIT REPORT TO THE SECRETARY OF STATE FOR A PERIOD OF TWO YEARS, THE SECRETARY OF STATE MAY PREPARE AND FILE A STATEMENT THAT THE CORPORATION HAS FORFEITED ITS STATUS AS A BENEFIT CORPORATION AND IS NO LONGER SUBJECT TO THIS ARTICLE. IF THE CORPORATION SUBSEQUENTLY DELIVERS A BENEFIT REPORT TO THE SECRETARY OF STATE FOR FILING, THE STATUS OF THE CORPORATION AS A BENEFIT CORPORATION SHALL BE AUTOMATICALLY REINSTATED UPON THE FILING OF THE BENEFIT REPORT BY THE SECRETARY OF STATE AND THE CORPORATION SHALL AGAIN BE SUBJECT TO THIS ARTICLE.

1 (F) THE ANNUAL BENEFIT REPORT SHALL BE IN ADDITION TO ALL OTHER
2 REPORTING REQUIREMENTS UNDER THIS CHAPTER.
3 S 4. This act shall take effect on the sixtieth day after it shall
4 have become a law.